SAM DAY IV
v.
AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

and

WINDOW ROCK MALL, LTD.
v.
ACTING AREA DIRECTOR, NAVAJO AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 82-5-A and IBIA 82-35-A Decided October 6, 1983

Appeals from decisions of the Navajo Area Director and Acting Area Director involving a sublease of Indian trust land.

IBIA 82-5-A reversed.
IBIA 82-35-A affirmed.

1. Administrative Procedure: Substantial Evidence--Evidence: Sufficiency

The Board of Indian Appeals will not disturb an Administrative Law Judge's finding of fact that is supported by substantial evidence in the record.

2. Evidence: Credibility

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

3. Indian Lands: Leases and Permits: Revocation or Cancellation

It is improper for the Bureau of Indian Affairs to reinstate a canceled lease of Indian trust lands when the lessee fails to show, after an opportunity for curing defaults, that the defaults have been cured or that they will be cured in the immediate future.

APPEARANCES: Ronald E. Warnicke, Esq., and John B. Shadegg, Esq., Phoenix, Arizona, for Sam Day IV; Robert D. Montgomery, Esq., and Linda R. Bonnefoy, Esq., Albuquerque, New Mexico, for Window Rock Mall, Ltd.; William D. Back, Esq., and Daniel M. Rosenfelt, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for the Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The two consolidated appeals addressed in this opinion relate to the operation of a retail shopping center on approximately 5 acres of Navajo tribal trust land in Window Rock, Arizona. The prime lease on this acreage, # FD-56-20, was entered into on May 24, 1973, between the Navajo Nation (tribe) and Sam Day IV (Day). In 1973 Day was a minor and was represented by his mother as his trustee. A sublease, #FD-56-20A (sublease), executed by Day's mother on his behalf on November 21, 1974, with Window Rock Mall (Mall), was approved by both the Navajo Nation and the Secretary of the Interior on November 25, 1974. Mall's conduct with respect to the operation of this sublease is the subject of both the present appeals.

The two appeals, which were referred to the Board of Indian Appeals (Board) by the office of the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR 2.19(a), were consolidated by order of the Board on April 5, 1982. Docket No. IBIA 82-5-A, filed by Day, seeks a determination that a February 17, 1981, decision of the Navajo Area Director, Bureau of Indian Affairs (BIA), improperly reinstated the sublease. Docket No. IBIA 82-35-A, filed by Mall, challenges a February 24, 1982, letter by the Acting Navajo Area Director canceling the sublease for the second time. On October 4, 1982, after consideration of initial pleadings, the Board determined that the appeals should be referred to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision.

The appeals were assigned to Administrative Law Judge Robert W. Mesch. Following the conclusion of preliminary proceedings, a hearing was held on December 7 and 8, 1982, in Gallup, New Mexico. The Administrative Law Judge issued a recommended decision on April 14, 1983. Only BIA exercised its right under 43 CFR 4.339 to file comments on the recommended decision. The BIA indicated its support for the recommended disposition offered by the Administrative Law Judge, but raised several additional legal issues which it believed the Board should consider. 1/

1/ The first legal issue raised by BIA concerns the effect of the decision in Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695 (D. Ariz. 1981). This decision is discussed in note 4, infra. The second legal issue involves the fact that, should the Board hold that the sublease was improperly canceled, Mall still does not have a valid traders license as required by 25 CFR Part 141. Because of the Board's disposition of these cases, this issue is not considered.

The Board has fully reviewed the administrative records in these appeals, including the background records submitted by BIA, the pleadings filed by the parties, the transcript of the hearing and exhibits submitted at the hearing, the recommended decision, and BIA's subsequent filing. The Board finds that both Day and Mall have been afforded a full opportunity to present their positions and that Mall has been given notice of the alleged violations of the sublease and an opportunity either to cure the alleged violations or to show cause why the sublease should not be canceled, as provided in 25 CFR 162.14. The Board adopts the findings of fact and conclusions of law set forth in the recommended decision and summarized below. A copy of the recommended decision is attached to this opinion and incorporated by reference.

As discussed at pages 6-8 of the recommended decision, the Administrative Law Judge held that the issues for decision were (1) whether Mall had paid the full amount of rent due to Day under paragraph 7 of the sublease; (2) whether Mall had submitted the certified statements of gross receipts required by paragraph 6 of the lease and incorporated by paragraph 14 of the sublease; (3) whether Mall had paid the correct amount of rent due to the Navajo Nation under paragraph 5 of the lease, as incorporated by paragraph 14 of the sublease; and (4) whether the Area Director erred in reinstating the sublease on February 17, 1981.

In regard to the first issue, the Administrative Law Judge found

> that at the time of the hearing, December 7, 1982, Mall had cured the rental defaults to Day and had paid Day the full amount of rent due Day under the sublease; however, there may be a significant question as to whether it would be proper to permit the sublease to remain in existence by allowing Mall until the time of the hearing to cure all past rental defaults, which extended over an eight-year period.

Recommended decision at 23. The Administrative Law Judge discusses this issue at pages 8-12 of the recommended decision.

[1] The question of whether Day was paid the rent due him under the lease is primarily a question of fact. The Administrative Law Judge is the finder of fact. The finding that Day has been paid the rent due him is supported by substantial evidence in the record. There is no reason to disturb this finding. 2/

At pages 12-17 of the recommended decision the Administrative Law Judge discusses the issue of whether Mall submitted proper certified statements of gross receipts. The Administrative Law Judge concluded

> that at the time of the hearing Mall had not cured the defaults relating to the submittal of certified statements of gross

2/ Because of its disposition of the remaining issues in these appeals, the Board does not address the legal question raised by the Administrative Law Judge as to whether it would be proper to allow the sublessee to retain the sublease by permitting this default to be cured by the time of the hearing.

> receipts in that (i) it had not submitted any of the required statements for the years 1974, 1975, and 1976, and (ii) it had not submitted a reliable or satisfactory statement for the years 1977, 1978, and 1979.

Recommended decision at 23.

[2] The recommended decision notes at pages 13-14 that there was no dispute that certified statements of gross receipts were not submitted for 1974-1976. At the hearing, Mall submitted a document covering 1977-1979 which purported to be a statement of gross receipts for those years prepared by a certified public accountant. 3/ The Administrative Law Judge found that he could give no credence to this document, and instead credited the report and testimony of a BIA auditor to the effect that he could not find "any basic 'source documents' [or] any accounting data to support Mall's financial statements * * *. He concluded that the records were not auditable." Recommended decision at 15. Deference will be shown to the Administrative Law Judge's determination of the credibility of evidence and testimony. The Board finds no reason in the record to question the Administrative Law Judge's conclusion that proper certified statements of gross receipts were not submitted.

The third issue discussed in the recommended decision at pages 17-18 is whether Mall paid the correct amount of rent to the Navajo Nation. The Administrative Law Judge concluded "that at the time of the hearing, Mall did not satisfy its burden of showing that it had paid the correct amount of rent due the Navajo Tribe for the years 1977, 1978, and 1979." Recommended decision at 23-24.

Mall attempted to show that the amount of rent paid to the tribe in 1977-1979 was proper under the alleged statement of gross receipts submitted at the hearing. Because the Administrative Law Judge found that he could not give credence to this document, he held that Mall had failed to satisfy its burden of showing that the proper amount of rent due the tribe was paid. The Board agrees with this conclusion.

The final issue addressed by the Administrative Law Judge is whether the sublease was properly reinstated on February 17, 1981. This discussion appears at pages 18-23 of the recommended decision. The Administrative Law Judge concludes that "the Area Director acted improperly in reinstating the sublease." Recommended decision at 24.

The Administrative Law Judge found that:

> No evidence was presented at the hearing explaining in any way or shedding any light on the questions of how the Area Director concluded (1) that Mall's default in entering into subleases

3/ The alleged preparer of this document had apparently died 2 years before the hearing.

> with its tenants without proper approvals of the Tribe and the Secretary [in violation of paragraphs 8 of the sublease and 11 of the lease] was timely cured by Mall's letter, which is not in evidence, purporting to cancel the unapproved subleases when, as recognized by the Area Director's reinstatement decision, the tenants remained and were operating businesses in the shopping center under arrangements or understandings that were neither revealed to nor approved by the Area Director; and (2) that Mall's default in failing to comply with the traders license requirements [of paragraph 12 of the sublease] was timely cured thirty days after receipt of the October 20, 1980 notification letter when Mall had not obtained the required license within the thirty day cure period * * * and, in fact, did not even have a traders license at the time of the reinstatement decision of February 17, 1981, and in all likelihood could not obtain one in view of the positions taken by the Navajo Tribe. [4/]

Recommended decision at 22.

[3] The Board agrees with the Administrative Law Judge that it was improper for BIA to reinstate the canceled sublease when the sublessee had failed to show, after an opportunity for curing the alleged violations, that the violations had been cured or that there was even a reasonable possibility that they could be cured in the immediate future. Therefore, the Board agrees that it was error for the sublease to be reinstated.

Accordingly, the Board has determined that it is appropriate to accept the recommendation that the "February 17, 1981 reinstatement decision of the Area Director should be reversed." Furthermore, the Board finds that even if the reinstatement decision had been correct when made, "the sublease should [now] be cancelled under 25 CFR 162.14 for failure of the sublessee to show, after a hearing, that it had cured all of the defaults complained of by the Acting Area Director in his notice or decision of February 17, 1982." Recommended decision at 24.

4/ On Nov. 25, 1980, the Navajo Tribal Court entered a default judgment in No. WR-CV-498-80 against Mall and in favor of Day. On Nov. 26, 1980, the Chairman of the Navajo Tribal Council wrote the Area Director requesting cancellation of both the lease and sublease pending further tribal investigation into the matter. On Dec. 10, 1981, the Advisory Committee of the Navajo Tribal Council adopted Resolution ACD-160-81 canceling sublease # FD-56-20A.

The Administrative Law Judge questioned whether the sublease was not canceled when Day attempted to cancel it unilaterally through the Navajo Tribal Court. The Board declines to hold that the sublease of trust property was effectively canceled by the action of Day and the Navajo Tribal Court. See Yavapai-Prescott Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983) (reversing the Federal District Court's opinion reported at 528 F. Supp. 695 (D. Ariz. 1981)).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 17, 1981, decision to reinstate sublease # FD-56-20A is reversed, and the Acting Area Director's February 24, 1982, decision to cancel the sublease is affirmed.

Wm. Philip Horton
Chief Administrative judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge

United States Department of the Interior
Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138-1194

April 14,1983

SAM DAY IV,	:	Docket No. IBIA 82-5-A
Appellant	:	
	:	
v.	:	
	:	
AREA DIRECTOR, NAVAJO AREA	:	
OFFICE, BUREAU OF INDIAN AFFAIRS,	:	
Respondent	:	
and	:	
	:	
WINDOW ROCK MALL, LTD.,	:	
Intervenor	:	
.....		
WINDOW ROCK MALL, LTD.,	:	Docket No. IBIA 82-35-A
Appellant	:	
	:	
v.	:	
	:	
ACTING AREA DIRECTOR, NAVAJO AREA	:	
OFFICE, BUREAU OF INDIAN AFFAIRS,	:	
Respondent	:	
	:	
and	:	
	:	
SAM DAY IV,	:	
Intervenor	:	

RECOMMENDED DECISION

Appearances: John B. Shadegg, Esq., of Treon, Warnicke & Roush, P.A., Phoenix, Arizona, for Sam Day IV;

Robert D. Montgomery, Esq. , and Daniel J. Herbison, Esq. , of Robt. D. Montgomery & Associates, P.A., Albuquerque, New Mexico, for Window Rock Mall Ltd.;

William D. Back, Esq., Office of the Solicitor, Department of the Interior, Window Rock Arizona, for the Bureau of Indian Affairs.

Before: Administrative Law Judge Mesch.

Procedural Background and Issues

By an order dated October 4, 1982, the Interior Board of Indian Appeals referred these consolidated cases for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

The cases involve a prime lease, No. FD-56-20, and a sublease, No. FD-56-20A, covering about five acres of Navajo tribal trust land used as a retail shopping center at Window Rock, Arizona. The prime lease was entered into on May 24, 1973, between the Navajo Tribe, as lessor, and Sam Day IV (hereinafter Day), a member of the Navajo Tribe, who was then a minor, and his mother, acting as trustee for her minor son, as lessees. The lease was approved by the Bureau of Indian Affairs (hereinafter the BIA). The sublease was entered into on November 21, 1974, between Day and his mother, individually and as his trustee, as sublessors, and Window Rock Mall Ltd. (hereinafter Mall), a corporation, as sublessee. The sublease was approved by the BIA.

The case designated as Docket No. IBIA 82-5-A involves an appeal by Day from a letter decision of the Area Director dated February 17, 1981. In his appeal, Day challenged the action of the Area Director in reinstating the sublease. The circumstances leading up to the reinstatement decision and Day's appeal are as follows.

By a letter dated October 20, 1980, the Acting Area Director notified Mall pursuant to paragraph 10(d) of the sublease that it was in default for failure (1) to file a proper performance bond, (2) to furnish required insurance, (3) to pay interest on previous

past due rental to the Navajo Tribe, (4) to enter into properly approved subleases with its tenants, and (5) to obtain a traders license. Mall was given thirty days to cure the violations described or suffer the cancellation of the sublease. On November 26, 1980, the Acting Area Director notified Mall that the sublease was cancelled because of a failure (1) to enter into properly approved subleases with its tenants, and (2) to obtain a traders license.

On January 19, 1981, the Area Director agreed to reconsider the decision cancelling the sublease, and on February 17, 1981, the sublease was reinstated. The Area Director explained in his letter decision reinstating the sublease that Mall had, in fact, terminated the improper subleases with its tenants within the time allowed, although this fact was unknown at the time of cancellation. The Area Director's reinstatement decision was silent with respect to the traders licensing requirement. Day appealed the reinstatement decision.

The question for determination in the Day appeal is whether the Area Director erred in reinstating the sublease by concluding that the two defaults, which resulted in the cancellation of the sublease, had been timely corrected.

In a posthearing brief, Day contends that he, as the sublessor, had properly and effectively cancelled the sublease pursuant to its termination provision prior to the reinstatement decision of the Area Director; that the Navajo District Tribal Court had rendered a judgment cancelling the sublease prior to the reinstatement decision; that the Court of Appeals of the Navajo Nation has made the cancellation judgment final; and that neither the Area Director nor anyone else within the Department of the Interior has any authority to reinstate the terminated sublease.

The issue presented by Day's contentions will not be considered in this decision. It was not timely raised as a result of an order I issued establishing guidelines for the proceeding; and, in any event, it is a legal issue which the Board of Indian Appeals was fully aware of and presumably found to be without merit when it referred the consolidated cases for an evidentiary hearing. Apparently, the Board takes the position that the sublease could not be terminated without Secretarial approval or action. See Kuykandall v. Phoenix Area Director and Yavapai-Prescott Tribe, 8 IBIA 76, 87 I.D. 189 (1980), rev'd in Yavapai-Prescott Indian Tribe v. Watt, 528 F.Supp. 695 (D. Ariz., 1981).

The case designated as Docket No. IBIA 82-35-A involves an appeal by Mall from two letter decisions of the Acting Area Director dated February 17, 1982, and February 24, 1982. The February 17, 1982 decision denied Mall's request for the renewal of a reservation business (or traders) license because (1) the approval of the Navajo Tribal Council had not been obtained, (2) the Navajo Tribal Court had cancelled the sublease between Day and Mall, (3) Mall had failed to provide required certified statements of gross receipts, (4) there was a possible failure to pay the correct amount of rent due the Navajo Tribe, and (5) Mall was in default in its rental obligations to Day.

The question for determination in Mall's appeal from the February 17, 1982 decision would normally be whether the Acting Area Director erred in refusing to renew Mall's license to trade for the reasons specified in his decision.

The February 24, 1982 decision of the Acting Area Director cancelled the sublease between Mall and Day because "you [Mall] will no longer have a valid reservation business license as required by the regulations and your sublease".

The question for determination in Mall's appeal from the February 24, 1982 decision would normally be whether the Acting Area Director erred in cancelling the sublease because the license to trade was not renewed.

In its referral order of October 4, 1982, the Board of Indian Appeals converted Mall's appeal from the two decisions to a modified lease cancellation proceeding under 25 CFR162.14 and to what it termed a "show cause hearing". In its order of October 4, 1982, the Board stated:

> * * * The February 17 and 24, 1982 notices provided neither the required 30-day cure period required by the terms of the sublease nor the safeguards mandated by 25 CFR 131.14. [Redesignated 25 CFR 162.14 on March 30, 1982]. The provisions of 25 CFR 131.14 are mandatory in cases involving lease cancellation; the regulation is binding upon the agency. * * *
>
> * * * * * *
>
> * * * Since the posture of this matter is now that of a show cause hearing, Mall shall be entitled to present evidence to support its contentions that it is in compliance with the terms of sublease # FD-56-20A at the outset of the proceeding. Alternatively, Mall may, if it chooses, offer evidence to show that it has cured the defaults complained of by the notice to it dated February 17, 1982.

By an order dated October 15, 1982, I scheduled a hearing and established guidelines for the proceeding. Among other things, I advised the parties that:

> * * * Unless something further develops, the next to the last sentence [in the Board's order quoted above] will be construed as being restricted to the [sublease] defaults complained of by the notice or decision of February 17, 1982, i.e., a failure to provide certified statements of gross receipts, a possible failure

> to pay the correct amount of tribal rent, and a failure to pay the correct amount of rent to Day.
>
> The Area Director is directed to provide Window Rock [Mall] with a statement by November 5, 1982, with copies to my office and other interested parties, specifying (1) the years in which he contends there was a failure to provide the required certified statements of gross receipts, (2) the years in which he contends there was or might have been a failure to pay the correct amount of tribal rent, and (3) the details of the allegation that there was a failure to pay the correct amount of rent to Day, i.e., the precise amounts and the periods of time.

By a letter dated November 3, 1982, the Acting Area Director responded and advised that (1) it had been determined that Mall did not utilize the services of a certified public accountant, as required by the sublease, for the calendar years 1977, 1978, and 1979, and, additionally, there was no evidence to indicate that a certified public accountant prepared the financial reports submitted by Mall prior to 1977; and (2) the failure to provide accurate accounting records for calendar years 1977, 1978, and 1979 make it impossible to determine whether the correct amount of tribal rent was paid. The Acting Area Director did not give any meaningful response to the request that he specify the precise amounts and periods of time that there was a failure to pay the correct amount of rent to Day.

A hearing was held on December 7 and 8, 1982, at Gallup, New Mexico. At that time the following rulings were made:

1. My order of October 15, 1982, set forth the three default issues that Mall had the burden of showing did not exist or had been cured, i.e., the alleged failure (i) to provide the required certified statements of gross receipts, (ii) to pay the correct amount of tribal rent, and (iii) to pay the correct amount of rent

to Day. The Area Director and Day were precluded from raising any other default issues or other issues at the hearing inasmuch as they did not timely seek any modification of my October 15, 1982 order. Specifically, they were precluded from raising any issue relating to the lack of a reservation business license or the affect of the final judgment of the Navajo Tribal Court cancelling the sublease (both of which had been before the Board of Indian Appeals and did not, in any event, involve any questions of fact). (I Tr. 6-16, 27). 1/

2. The question to be determined under the Board's order of October 4, 1982, and under the alternative position taken by Mall under the Board's order, was whether the asserted defaults had been cured as of the time of the hearing. The Board had not raised any issues for determination relating to the questions of whether any alleged defaults were of such a nature that they could not be cured or could only have been timely cured at some date prior to the time of the hearing. (I Tr. 22-30).

At the hearing, Mall raised an issue relating to an alleged settlement and compromise agreement between itself and Day, which purportedly disposed of the appeals of the two parties and ended the proceeding. Mall's contentions do not have sufficient merit to even warrant discussion or consideration in this decision.

At the conclusion of the hearing, the parties were given the opportunity to file opening briefs, answer briefs and reply briefs. Mall filed an opening brief in its case and Day and the BIA filed

1/ The reporter prepared separate volumes of the transcript for the two appeals. A transcript reference preceded by I refers to the Mall appeal and one preceded by II refers to the Day appeal.

answer briefs. Day filed an opening brief in his case, the BIA filed an answer brief, and Day filed a reply brief.

This decision will cover, in the order stated, the questions of (1) whether Mall has paid the full amount of rent due Day under the sublease, (2) whether Mall has submitted the required certified statements of gross receipts, (3) whether Mall has paid the correct amount of rent due the Navajo Tribe, and (4) whether the Area Director erred in reinstating the sublease on February 17, 1981.

The Payment of Rent to Day

The sublease provides that Mall will pay a monthly rental of $833.33 to Day and his mother, as his trustee. A document attached to and made a part of the sublease provides that (1) one-half of the monthly rental will be paid directly to the First State Bank of Gallup, New Mexico, for deposit in a special trust account for Day until he reaches the age of 21 years, when all future payments of his interest in the rentals will be made directly to him, and(2) the remaining one-half of the rentals will be paid directly to his mother. Another document attached to and made a part of the sublease recites that Day's mother holds the prime lease from the Navajo Tribe in trust for the use and benefit of Day. It provides that during the life of the trust the yearly income will be divided equally between Day and his mother, the trustee, with one-half being paid to the trustee as her separate property; and on the 21st birthday of Day, the trustee will pay over and deliver to Day all of the property in the trust. (Mall Ex. No. 2). On August 4, 1980, Day's mother, as trustee, executed a document reciting that Day had reached the age of majority and she was, by the execution of the document, delivering all of the trust property to Day and assigning all of her right, title and interest in the Navajo tribal lease to Day. (Mall Ex. No. 3).

From the date of the sublease, November 21, 1974, through the termination of the trust on August 4, 1980, Day was entitled to have one-half of the monthly rental deposited in a special trust account for his benefit at the First State Bank of Gallup. For the 5-year, 8-month and 14-day period, $28,528.02 should have been deposited by Mall in the trust account for Day. ($416.67 x 68 months ÷ $13.89 x 14 days). During this period, Mall did not deposit any money in a trust account for Day at the First State Bank of Gallup. Mall and Day agree that a total of $3,083.34 was paid in rent to Day on the following dates: April of 1979 - $2,250.00 and June 13, 1979 - $833.34. (Mall Ex. No. 5; I Tr. 20, 49, 50, 89, 117-120; Mall Opening Brief, page 2; Day Answer Brief, page 15). There was a deficiency of $25,444.68 in the rent that should have been paid to Day for the period from November 21, 1974, to August 4, 1980.

On August 4, 1980, Day, as the sublessor, notified Mall that it was being given thirty days written notice of the termination of the sublease because, among other listed defaults, there was a substantial delinquency in the rental due Day. (Day Ex. Nos. 1 and 2). The sublease, which had been approved by a representative of the BIA, provides in paragraph 10(d) that:

> * * * In the event of default or breach of any of the terms hereof by the sublessee, the sublessor shall give written notice of such default. Within thirty (30) days after receipt of such notice, the sublessee shall correct the default complained of. Failure to so correct the default shall terminate the sublease. (Mall Ex. No. 2)

Mall and Day agree that a total of $6,966.60 was paid in rent to Day on the following dates: September 2, 1980 - $6,666.72 and September 8, 1980 - $299.88. (Mall Ex. No. 5; I Tr. 20, 49, 50, 89, 117-120; Mall Opening Brief, page 2; Day Answer Brief, page 15).

By an order dated November 25, 1980, the Navajo District Tribal Court cancelled the sublease and awarded judgment against Mall and in favor of Day in the amount of $31,415.33 for delinquent rental through November of 1980. (Day Ex. No. 6). Mall filed an appeal and an application for a writ of prohibition with the Court of Appeals of the Navajo Nation. On December 18, 1981, the Chief Justice of the Navajo Nation dismissed the appeal because it had not been timely filed and denied the request for a writ of prohibition. (Day Ex. No. 25). On December 21, 1981, the Navajo District Tribal Court issued a writ of execution seeking to recover the amount of its judgment with accruing interest and cost. (Day Ex. No. 14). On December 23, 1981, Mall paid the Clerk of the District Court of the Navajo Nation $31,415.33 and this sum was released to Day. (Mall Ex. Nos. 6 and 7). Day contends that the Tribal Court judgment was paid to the Navajo Tribe and not to him. I find no evidence that the statement in Mall's Exhibit No. 7 concerning the release of the money to Day is in error. In addition, Day's present contention is contrary to a stipulation he made at the hearing acknowledging the receipt of the amount of the Tribal Court judgment. (I Tr. 52).

There is uncontradicted evidence that one of Mall's tenants, who was a relative of Day, paid Day $3,000.00 that was due from the tenant as rent to Mall. (I Tr. 90, 219). In a posthearing brief, Day disputes the payment and the receipt of this money. The $3,000.00 payment was testified to by the President of Mall and the relative of Day, who was called as a witness by Day. Day had an opportunity to controvert the payment at the time of the hearing but did not do so. I see no reason why the $3,000.00 should not be credited as rent paid to Day, as contended by Mall.

If, as the Board of Indian Appeals has apparently concluded, the sublease was not terminated by the action of Day under paragraph 10(d) of the lease and the judgment of the Navajo Tribal Court, then for the 1-year, 4-month and 27-day period between August 4,

1980, and January 1, 1982, an additional $14,083.34 should have been paid as rent to Day. ($833.33 x 16 months + $27.78 x 27 days). With the prior deficiency of $25,444.68 as of August 4, 1980, the total rent due Day as of January 1, 1982, was $39,528.02. With the payment of the $6,966.60 during September of 1980, the payment of the Tribal Court judgment in the amount of $31,415.33 and the payment of the $3,000.00 noted above, and ignoring interest on past due rent, Day was overpaid by $1,853.91 as of January 1, 1982.

On January 28, 1982, the Area Director wrote Hall stating that "rental payments in the amount of $10,833.29 are due and payable to" Day. (Mall Ex. No. 12). In response, Mall delivered the demanded amount plus an additional month's rent and the Acting Area Director transmitted $11,666.66 to Day's attorney. Day's attorney accepted the $11,666.66 "as compensation for the use of the premises by Window Rock Mall, Ltd. following its wrongful refusal to vacate * * * after the termination of the sublease" by Day and the judgment of the Navajo District Court. (Mall Ex. No. 8).

On December 1, 1982, Mall gave Day $10,000.00 and he signed a document stating that "Sam Day IV is paid in full through December 31, 1982". (Mall Ex. No. 9). Day testified that he accepted the money as rent under the sublease, but it was not his intention to reinstate the lease. (I Tr. 123, 124, 143).

If the sublease had not previously been terminated, then for the one-year period from January 1, 1982, to January 1, 1983, an additional $9,999.96 should have been paid in rent to Day. With the prior overpayment of $1,853.91 as of January 1, 1982, and the 1982 payments of $21,666.66, and ignoring interest on past due rent, Day was overpaid by $13,520.61 as of January 1, 1983, and he was overpaid by $14,353.94 as of December 1, 1982.

Day contends that if all of the payments noted above, except the $3,000.00 paid by Day's relative, are credited to Mall's rental obligation, then there was still a delinquency on the date of the hearing of some $400.00. Crediting the $3,000.00, as I have done, eliminates the alleged deficiency of some $400.00. In any event, there is no merit to Day's position. Day arrives at his delinquency figure by compounding interest at the rate of 8 percent on each rental payment that was not made when due. He bases the interest figure on the prime lease between the Navajo Tribe and Day, which was incorporated by reference in the sublease and which provides that unpaid rental shall bear interest at 8 percent from the date it becomes due. The provision in the prime lease relates only to interest on unpaid rentals due the Navajo Tribe. There is nothing in the prime lease or the sublease that relates in any way to interest on unpaid rentals due Day.

I conclude that at the time of the hearing, December 7, 1982, Mall had paid Day the full amount of rent due Day under the sublease. There may, however, be a significant question -- which was not presented as an issue for determination by the Board of Indian Appeals or raised as an issue by Day or the Area Director prior to the hearing and on which the parties have not had any opportunity to present any evidence in support of any position -- as to whether the sublease should be permitted to remain in existence simply because at the time of the hearing, Mall had finally cured all past rental defaults.

The Submittal of Statements of Gross Receipts

The prime lease between the Navajo Tribe and Day provides for the monthly payment of rental to the Tribe based on designated percentages of gross receipts of designated businesses in the shopping center. It further provides that:

> The Lessee shall, not later than March 31 of each successive calendar year or fraction thereof following the date the term of this lease begins, submit to Lessor and the Secretary individually, certified statements of gross receipts. Failure to submit aforementioned statements on a timely basis shall be considered a breach of the lease and the lease may be subject to cancellation.
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> * * * * * *
>
> * * * Said statement shall be prepared by a Certified Public Accountant, licensed in the State of Arizona, New Mexico, or Utah, in conformity with standard accounting procedures. * * * (Mall Ex. No. l)

The sublease provides that Mall shall pay the rental rates prescribed in the prime lease to the Navajo Tribe. It further provides that "[t]his sublease is expressly made subject to all of the terms, conditions, and limitations contained in the lease between the sublessor and the Navajo Tribe of Indians. (Mall Ex. No. 2).

As noted previously, my order of October 15, 1982, which established guidelines for the proceeding, directed the Area Director to apprise Mall of the years in which he contended there was a failure to provide the required certified statements of gross receipts; and, in response, the Area Director stated that (1) from an audit for calendar years 1977, 1978, and 1979, it was determined that Mall did not utilize the services of a certified public accountant as required by the sublease; and (2) additionally, there was no evidence to indicate that a certified public accountant prepared the financial reports submitted to the BIA and the Navajo Tribe prior to 1977.

The evidence is undisputed that Mall did not submit, on a timely basis or otherwise, any certified statements of gross receipts

prepared by a licensed certified public accountant to the Navajo Tribe or the BIA for the years 1974, 1975, and 1976, as required by the prime lease and the sublease. (I Tr. 57, 62, 63, 209).

On December 6, 1982, the day before the hearing, Mall delivered to the BIA a copy of a document dated January 22, 1980, which was purportedly prepared by Maximilian M. Gonzales, who was allegedly a certified public accountant in Albuquerque, New Mexico. The document certified to the gross receipts, based upon an audit of all ledgers, journals, and other documentation, for the period from January 1, 1977, through December 31, 1979. (Mall Ex. Nos. 15 and 19; I Tr. 76).

The evidence is confusing as to whether the purported certified statement of gross receipts for the years 1977, 1978, and 1979 was delivered to the Navajo Tribe prior to the hearing. Day and the Area Director strenuously argue that it was not, and contend that Mall had not, therefore, cured this default. I see no reason to draw any significant distinction between delivering the document to the Tribe the day before the hearing and presenting the document at the time of the hearing.

The real question is whether the Gonzales certified statement of gross receipts satisfies the requirements of the prime lease and the sublease. Under the circumstances, I do not believe that a person of reasonable prudence would find the statement acceptable as the basis for computing the amount of rent that should be paid to the Navajo Tribe. I say this because:

1. Properly certified statements of gross receipts were not submitted to the BIA and the Navajo Tribe by March 31, 1978, for calendar year 1977; by March 31, 1979, for calendar year 1978; and by March 31, 1980, for calendar year 1979. In lieu thereof, one certified statement was submitted in December of 1982, almost three

to five years after the fact, and almost three years after it had been allegedly prepared, and more than two years after the death of the alleged preparer. (Mall Ex. Nos. 15 and 19; I Tr. 71). If, as Mall asserts, the statement was prepared by a duly licensed certified public accountant and was in existence on January 22, 1980, a question arises as to why the Gonzales certified statement was not submitted prior to the Area Director's decision of February 17, 1982. Another and even more serious question arises as to why it was not presented to the Board of Indian Appeals on the appeal from the Area Director's decision.

2. An accountant with the BIA conducted an audit of Mall's business between November of 1979 and December of 1980 for the years 1977, 1978, and 1979. (BIA Ex. No. 1, I Tr. 202). Mall referred him to a bookkeeper to assist him with his audit. (I Tr. 191). Although the Gonzales certified statement had allegedly been prepared almost a year before he completed his audit, and for the precise years in question, Mall did not refer him to Gonzales, did not make him aware of Gonzales, and did not provide him with a copy of the Gonzales certified statement. (I Tr. 191, 202). A question arises as to why Gonzales and his allegedly previously prepared work were kept secret.

3. In his audit, the BIA accountant did not find any records that were certified by a certified public accountant (I Tr. 201); he did not find any basic "source documents" (I Tr. 189); and he could not find any accounting data to support Mall's financial statements (I Tr. 189, 190). He concluded that the records were not auditable. (BIA Ex. No. 1). The BIA auditor was subject to cross-examination. Gonzales was not. It is not known how Gonzales was able to prepare his certified statement when the BIA auditor found the records to be inauditable.

4. The evidence leads one to believe that no one in behalf of Mall ever audited the books of its tenants at the shopping center and the tenants never provided Mall with certified statements of their gross receipts. (I Tr. 102-108, 215, 216). As a result, it is difficult to believe that Mall or Gonzales could have provided a certified statement of gross receipts prepared "in conformity with standard accounting procedures".

5. The prime lease defines "gross receipts" as meaning "all income derived from business done, sales made, or services rendered directly or indirectly from or on the leased premises or any portion thereof". (Mall Ex. No. 1). The evidence shows that during 1977, 1978, and 1979, Mall received sublease rental income of at least $154,945.00 from some of its tenants using some of the improvements on the leased premises. (BIA Ex. No. 1; I Tr. 195-197). The receipt of this income was not shown in the Gonzales certified statement of gross receipts. It would certainly seem that a proper certified statement of gross receipts would include a certification as to all, not just some, of the gross receipts derived by Mall from its business activities under the leases.

6. By a letter dated March 27, 1981, the Area Director advised Mall that:

> The Bureau's audit report for the years 1977, 1978, and 1979 was mailed to you on December 9, 1980. The audit found that your records were incomplete and did not support the submission of annual financial reports. (Day Ex. No. 11)

Mall's attorney responded by a letter dated April 14, 1981, and, in addressing the "problems in audit report dated December 9, 1980, and our efforts to correct them", stated:

> * * * Window Rock Mall, Ltd. has attempted to obtain the information necessary to complete

> the records. Despite repeated demand we have been unable to obtain additional information. We will continue to demand that an accurate accounting be made and take additional, legal steps if necessary.
>
> With regard to past sub-leasing on the part of Window Rock Mall, Ltd., as noted in the Audit Report no rate has yet been established for payment to the Tribe of tribal taxes [rent] on these receipts. It will be necessary to complete these negotiations before final settlement can be made. * * * (Mall Ex. No. 10)

If Gonzales, an alleged certified public accountant, had prepared a statement dated January 22, 1980, certifying to the gross receipts for the three years in question "in conformity with standard accounting procedures", then it is simply inconceivable that Mall's attorney would have responded as he did on April 14, 1981, and that Mall would not have delivered the Gonzales certified statement to the BIA Prior to December 6, 1982, the day before the hearing.

I conclude that at the time of the hearing, December 7, 1982, Mall had not submitted any certified statements of gross receipts to the Navajo Tribe and the Secretary for the years 1974, 1975, and 1976, as required by the prime lease and the sublease; and Mall had not submitted a reliable and satisfactory certified statement of gross receipts meeting the requirements of the leases to the Navajo Tribe and the Secretary for the years 1977, 1978, and 1979.

The Payment of Rent to the Navajo Tribe

Under the terms of the leases, the rent payable to the Navajo Tribe is based upon designated percentages of the gross receipts for each of the various businesses authorized to be conducted on the leased premises. As noted previously, my order of October 15, 1982, directed the Area Director to apprise Mall of the years in which he contended there was or might have been a failure to pay the correct

amount of tribal rent; and, in response, the Area Director stated that the failure to provide accurate accounting records for calendar years 1977, 1978, and 1979 made it impossible to determine whether the correct amount of tribal rent was paid. At the hearing, I limited the evidence relating to the possible failure to pay the correct amount of tribal rent to the three years listed by the Area Director. (I Tr. 86).

Mall had the burden of showing that it paid the correct amount of tribal rent for the three years in question. It attempted to meet this burden by showing that it had paid the proper percentages of the gross receipts shown by the Gonzales certified statement covering the three years in question. I have found that the Gonzales statement is not reliable and does not meet the requirements of the leases. Accordingly, it must be concluded that Mall did not satisfy its burden of showing that it paid the correct amount of tribal rent for 1977, 1978, and 1979.

The Propriety of the Reinstatement Decision

On October 20, 1980, the Acting Area Director advised Mall that it was in default under the terms of the sublease and that unless the specific lease violations cited were cured within thirty days, the sublease would be cancelled for cause. (Mall Ex. No. 18). On November 26, 1980, the Acting Area Director advised Mall that the sublease was cancelled because Mall was "considered to be in continuing breach of the sublease, as follows":

> 1. Failure to enter into subleases with the tenants operating the individual businesses, with proper approvals of the Tribe and the Secretary. You were directed to furnish copies of all leases, contracts, rental agreements, management agreements, etc., entered into with the owners of businesses operating on the premises between the period November 25, 1974 and October 17, 1980. Agreements on all sub-

> leasing transactions have not been submitted. * * * In addition, no evidence was furnished which showed that Window Rock Mall, Ltd., cancelled all agreements with its tenants.
>
> 2. Failure to comply with 25 CFR 252 [redesignated as 25 CFR 141 on March 30, 1982], traders licensing requirements. (Day Ex. No. 7)

The prime lease, which is incorporated by reference in the sublease, provides that the lessee "shall not sublease * * * or transfer this lease or any right to or interest in this lease or any of the improvements on the leased premises without the written approval of the Lessor, [and] the Secretary". (Mall Ex. No. 1). The sublease provides that the "sublessees' rights may be assigned or transferred during the term of this sublease, subject to the written approval of the sublessor, the Chairman of the Navajo Tribal Council and the Secretary of the Interior". (Mall Ex. No. 2). The sublease also provides that "[t]he sublessee shall obtain a license to trade, as provided in Title 25, Part 252 [now Part 141], Code of Federal Regulations and in accordance with applicable Navajo Tribal Council or Advisory Committee Resolutions". (Mall Ex. No. 2).

Following a request by Mall, the Area Director agreed to reconsider the cancellation action. The Area Real Property Management Officer prepared a memorandum dated February 13, 1981, for the use of the Area Director in reconsidering the matter. (II Tr. 9, 10). In that memorandum, the Area Director was advised, among other things, that:

> [At a September 29, 1980 meeting, Mall represented] that the tenant operators were Mall employees. They were advised that unless they could show evidence that the tenants were employees, subleases with the tenants were required. * * *
>
> * * * * * *
>
> [On November 19, 1980, Mall's attorney] stated that all agreements with the tenants had been cancelled.

> However, no evidence was furnished to show that the agreements had actually been terminated, or that the Mall tenants were employees. Although partial information was furnished, the full disclosure concerning copies of all leases, contracts, rental agreements, management agreements was never made.
>
> * * * * * *
>
> On December 1, [1980] the Branch received copies of letters sent to Mall tenants on November 20, 1980, terminating their lease agreements. There is no evidence to show when the letters were mailed. However, there is a stamp date which shows the letters were received in the Area Director's office on November 26. Apparently, these letters and the Bureau's cancellation letter crossed in the mail.
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> * * * * * *
>
> Paragraph 12 of the Sublease requires the sublessee to obtain a license to trade. The Mall was in violation of this provision as well as 25 CFR 252.5 and 252.8 continuously since 1974. (Day Ex. No. 27, pp. 2, 3, 5)

On February 17, 1981, the Area Director reinstated the sublease. In his letter of reinstatement, he reiterated the fact that the failure to enter into properly approved subleases and the failure to comply with the traders licensing requirements were violations as of the date of the October 20, 1980 letter; and then stated:

> Your client, on November 20, 1980, terminated the improper, unapproved subleases with tenants at the Mall, although this fact was not known to the Bureau until after the Bureau's November 26, 1980 letter of termination had been sent.
>
> Although you have cancelled the subleases, please advise us immediately on the arrangements you have made with the tenants who are presently operating businesses in the Mall.

> You will be notified soon of separate lease violations believed to exist. (Mall Ex. No. 4)

The Area Director's letter was silent with respect to the traders licensing requirements. However, two days later, on February 19, 1981, an Assistant Area Director transmitted a 90-day temporary reservation business license to Mall. (Mall Ex. No. 22). This action was apparently taken under 25 CFR 252.9(b) [now 141.9(b)] which provides that "[t]he Commissioner may issue a temporary permit for three (3) months pending consideration of application for license renewal". Presumably, the action of the Assistant Area Director was taken without any regard for the fact noted in the Area Real Property Management Officer's memorandum that Mall had not had a license to trade since 1974, the inception year of the sublease; and, therefore, Mall held no license that could have been the subject of an application for renewal.

It should be noted at this point that the regulations relating to licensing requirements provide that:

> No person may own or lease a reservation business without a license issued under the provisions of this subpart. (25 CFR 252.5(a), now 141.5(a)).
>
> * * * * * *
>
> No application [for a license] is complete until any clearance or tribal council approval required by tribal or Federal regulations has been obtained. (25 CFR 252.6(b), now 141.6(b)).

If, as it appears, the Navajo Tribal Code provided that “the Navajo Tribe of Indians has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation” (5 N.T.C. § 401), then it is difficult to believe that the Area Director could reasonably have expected when he issued his rein-

statement decision that Mall would obtain an appropriate license as required by the sublease and the regulations in view of (1) the position taken by the Chairman, Navajo Tribal Council in a letter dated November 26, 1980, to the Area Director requesting the protection of the interests of the Tribe and Day (Day Ex. No. 8); and (2) the judgment of the Navajo Tribal Court of November 25, 1980, cancelling the sublease (Day Ex. No. 6).

No evidence was presented at the hearing explaining in any way or shedding any light on the questions of how the Area Director concluded (1) that Mall's default in entering into subleases with its tenants without proper approvals of the Tribe and the Secretary was timely cured by Mall's letter, which is not in evidence, purporting to cancel the unapproved subleases when, as recognized by the Area Director's reinstatement decision, the tenants remained and were operating businesses in the shopping center under arrangements or understandings that were neither revealed to nor approved by the Area Director; and (2) that Mall's default in failing to comply with the traders licensing requirements was timely cured thirty days after receipt of the October 20, 1980 notification letter when Mall had not obtained the required license within the thirty day cure period (II Tr. 30) and, in fact, did not even have a traders license at the time of the reinstatement decision of February 17, 1981, and in all likelihood could not obtain one in view of the positions taken by the Navajo Tribe.

Day contends that the action of the Area Director in reinstating the sublease was improper and should be vacated because (1) Mall's action in purporting to cancel the subleases with its tenants was meaningless; (2) Mall had not complied with the business licensing requirements even as of the date of the reinstatement letter of February 17, 1981; (3) even if the Area Director had, by some unknown means, the discretion to waive the defects that had not been timely cured, there was a complete abuse of that discretion in

view of the almost unbelievable history of Mall's actions in breaching the terms of the sublease, in failing to comply with the regulations, and in practicing misrepresentation and deceit -- all of which was revealed in the Area Real Property Management Officer's memorandum of February 13, 1981, which was prepared for the use of the Area Director; and (4) the Area Director completely disregarded his trust responsibility to insure the protection of the interests of the Navajo Tribe and Day.

I agree with Day's contentions and conclude that the Area Director erred in reinstating the sublease. I simply do not understand how or why the Area Director could or would conclude (1) that either one of the defaults had been timely corrected, or (2) that either one of the defaults should be excused. In connection with the latter, it is significant to note that at the time the Area Director reinstated the sublease, he advised Mall that it would soon be notified of other lease violations believed to exist.

Summary and Conclusion

In summary, I find (1) that at the time of the hearing, December 7, 1982, Mall had cured the rental defaults to Day and had paid Day the full amount of rent due Day under the sublease; however, there may be a significant question as to whether it would be proper to permit the sublease to remain in existence by allowing Mall until the time of the hearing to cure all past rental defaults, which extended over an eight-year period; (2) that at the time of the hearing Mall had not cured the defaults relating to the submittal of certified statements of gross receipts in that (i) it had not submitted any of the required statements for the years 1974, 1975, and 1976, and (ii) it had not submitted a reliable or satisfactory statement for the years 1977, 1978, and 1979; (3) that at the time of the hearing, Mall did not satisfy its burden of showing that it had paid the correct amount of rent due the Navajo Tribe for the

years 1977, 1978, and 1979; and (4) the Area Director acted improperly in reinstating the sublease on February 17, 1981.

If the sublease was not effectively cancelled by the action of Day -- under the express authorization given him in paragraph 10(d) of the sublease with the approval of the Bureau of Indian Affairs -- and the resulting final judgment of the Navajo Tribal Court, then the February 17, 1981 reinstatement decision of the Area Director should be vacated or reversed and the November 26, 1980 cancellation decision of the Acting Area Director should be reinstated and accorded finality. If neither of the above courses are followed, then the sublease should be cancelled under 25 CFR 162.14 for failure of the sublessee to show, after a hearing, that it had cured all of the defaults complained of by the Acting Area Director in his notice or decision of February 17, 1982.

The parties have the right to file exceptions or other comments regarding this recommended decision with the Board of Indian Appeals within thirty days after receipt of this decision in accordance with 43 CFR 4.339.

Robert W. Mesch
Administrative Law Judge